

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<div>SUMMIT CARBON SOLUTIONS, LLC,</div> <div>Petitioner,</div> <div>v.</div> <div>IOWA UTILITIES BOARD, A DIVISION OF THE DEPARTMENT OF COMMERCE, STATE OF IOWA,</div> <div>Respondent,</div> <div>And</div> <div>SIERRA CLUB IOWA CHAPTER and OFFICE OF CONSUMER ADVOCATE,</div> <div>Intervenors.</div>	<div>Case No. CVCV062900</div> <div><b>REPLY IN SUPPORT OF MOTION TO ADMIT SUMMARY JUDGMENT RECORD</b></div> <div><b>AND</b></div> <div><b>JOINDER IN OCA’S MOTION TO STRIKE SIERRA CLUB WITNESS LIST</b></div>
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**Reply in Support of Motion to Admit**

After the entry of a temporary injunction in this case, the parties conferred about a schedule for the remainder of the proceeding. At that time, all parties except Sierra Club expressed that they would be willing to submit this matter on briefs and oral argument. Sierra Club alone wanted to have a hearing. The parties reached a compromise on a schedule that would be a hybrid – Sierra Club could have its opportunity to solicit additional live testimony, but there would also be a round of briefs on the merits.<sup>1</sup> The resulting schedule, with its hearing date of July 7, 2022, included a deadline of June 23 for witness lists, exhibits, motions in limine and other pre-trial submissions. The only party to file anything on June 23 was the Office of

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<sup>1</sup> Unfortunately, through an apparent miscommunication between the parties and Court Administration, the Scheduling Order that was entered was vastly different from what the parties had agreed to. While no party took steps to correct the Order, it did have the anomalous effect of reversing the order of several deadlines, with odd results like having discovery close very early and before most pretrial events that would normally drive the content of the discovery.

Consumer Advocate (“OCA”). (While Sierra Club allegedly filed a witness list on June 24, as is discussed further below Summit Carbon had no way to know of that until June 30.)

On June 27, 2022, Summit Carbon filed a Motion to Admit Summary Judgment Record. Notice went out that day by EDMS; one of the parties expressed that they could not obtain the document despite receiving notice and Summit Carbon’s counsel then e-mailed the motion to all parties. The motion was simple: a small number of documents – the Iowa Utilities Board’s (“IUB”) responses to discovery requests from Sierra Club and Summit Carbon – were contained in the summary judgment record, they had been explored in some depth as part of the summary judgment proceedings, and they should be available for the parties to brief from in the post-hearing brief phase of the schedule.

OCA filed a resistance to this motion on two theories. First, that the motion was untimely, and second, that the summary judgment record is not admissible because the evidentiary standard is different for summary judgment as opposed to a trial. The Court should reject both of these arguments.

First, Summit Carbon’s motion does not pertain to witnesses, exhibits to be used at the hearing, or a motion in limine – it is not of a kind with the listed pretrial submissions. Indeed, Summit Carbon believes that a motion to admit materials already known could have properly been made at the time of hearing – it filed in advance as a courtesy to the Court and the parties and, as stated in the motion, to try and make the hearing as efficient as possible. As OCA itself admits in its separate Motion to Strike Sierra Club’s witness list, the purpose of the pretrial filings is to avoid trial by surprise. Unlike a new witness or new exhibits to be used with trial witnesses, there is no surprise that the lists of prior IUB dockets and whether a mailing list was

required at the outset of those dockets exists and is a part of the case. The interest is not implicated here.

OCA's evidentiary argument also overstates its case. Undeniably, the standard for evidence at trial and for evidence on a summary judgment motion are different. Nonetheless, OCA has not said what particular evidentiary issues it believes exist for the particular documents in question. The documents, discovery request responses from the party adverse to Summit Carbon, are clearly statements by a party opponent. Unless OCA is going to argue that the documents were forged and submitted fraudulently – an issue IUB presumably would have raised on summary judgment – it is virtually axiomatic that admissions against interest are admissible and are to be admitted.

Statements of an opposing party are admissible whether or not the opponent testifies. The opposing party's statements constitute substantive evidence of the facts asserted but are not conclusive evidence of those facts. Moreover, "[t]hat an out-of-court statement by an opposing party is admissible as substantive evidence at trial does not necessarily mean it can be equated with sworn trial testimony." However, personal knowledge of the matter stated is not required and apparently statements of opinion contained in an opposing party's statement are admissible.

The party-opponent is not required to testify prior to introduction of his or her statement, because the party-opponent usually will have an opportunity to testify to explain the admission or deny the statement. The party-opponent cannot seek exclusion of the admission because of lack of reliability of the statement, if made, based on observation defects, failure of memory or lack of opportunity by the party-opponent to cross-examine himself or his representatives when the statement was made. Such an assertion by the party-opponent would be meaningless, because the party-opponent would be suggesting that he is untruthful when not under oath and needs to be cross-examined to be accurate.

7 Ia. Prac., Evidence § 5.801:9 (Nov. 2021).

Moreover, the overwhelming majority of the summary judgment record is simply a listing of IUB dockets and whether or not a mailing list is somewhere in the file (publicly or not) for that docket. The list of dockets and whether a mailing list is available *publicly* in that docket

– that is, the official public records of the state executive branch – is a matter *the Court can judicially notice*. The only way to provide more or better evidence than what is in the summary judgment record regarding the non-public records would be for IUB to produce the entire file for each of the listed dockets for parties and the court to independently verify whether the file includes a mailing list from the applicant. That seems, however, wildly disproportionate to the case any party has presented. Particularly in the absence of a jury, and unless OCA has some particular reason to believe there is a problem with the lists provided, it is presumably much easier for the Court to work with the record in a digested, tabular form than having to look at all of the public, and potentially all of the private, in their entirety. The Court has already worked extensively with and is familiar with the contents of the lists of dockets as was obvious from the Court’s questions at the Summary Judgment hearing; that bell cannot be unwrung. OCA appears to be putting form above function with nothing to be gained. The Court should allow the summary judgment materials to be admitted for purposes of post-hearing briefing; the Court can give the evidence the weight it believes is appropriate.

### **Joinder in Motion to Strike**

Quite the opposite, however, striking Sierra Club’s effort to call IUB Chair Geri Huser is important to avoid trial by ambush or unfair surprise – unlike the contents of the Summary Judgment record, which had been long known to the parties, the potential to have the IUB Chair as a witness is a new and important development. As OCA’s motion notes, while the witness list was allegedly filed on June 24, 2022, EDMS did not provide a notice until June 30 – and counsel for Sierra Club did not e-mail a copy to the parties. As a result, Summit Carbon had no way to know about the designation of Chair Huser as a potential witness until the cusp of a holiday weekend, just seven days prior to hearing.

More troubling, from the resistance filed by Sierra Club on July 4, it appears there was an intent to surprise Summit Carbon. Sierra Club argues that it has “coordinated” with OCA, and that it had e-mailed with Jon Tack, counsel for the IUB. The only party in the dark until one week before hearing was Summit Carbon. This is prejudicial and works an injustice on Summit Carbon, whose rights are at stake in this proceeding.

Further, while Summit Carbon had planned on discussing this at more length in its post-hearing brief, calling the IUB Chair as a witness highlights a concerning tension in this case that should give the Court pause. The use of open records requests and related processes in a quasi-judicial matter, and how that interplays with the tribunal’s discovery process, is troubling. Presumably if the Court issued a protective order and allowed case materials to be filed under seal, and a party then filed an Open Records Act request for the sealed materials, the Court would not override its own order sealing the documents. But that is effectively what is happening in the present case. And now, by calling a decisionmaker in the contested case as a witness, it is similar to calling a judge as a witness as to why sealing of part of the record was allowed. Worse, because the contested case for Summit Carbon’s permit is ongoing, it risks exposing the IUB Chair to extra-record material, creates the potential appearance of favoritism by who her testimony benefits, and puts the parties in the difficult position of how and whether to aggressively cross-examine the decisionmaker in the case that underlies the records dispute.

Sierra Club had been participating in the IUB docket, and in fact availed itself of the IUB’s process by filing a motion to release the Summit Carbon mailing lists. Buried deep in that motion was a reference to the Open Records Act. Sierra Club should have been required as part of its participation in the IUB docket to abide by its processes, including discovery ruling. It at the least should have had to make an election between use of those processes through its motion

and the Open Records Request. A party should not be able to pick and choose when to abide by the terms of the proceeding it is in and when to go outside the still ongoing proceeding and use the Open Records Act. The issue of now calling the IUB Chair as a witness in an ongoing contested case shows the problems that can arise.

For reasons substantive and procedural, and to avoid unfair prejudice to Summit Carbon, the designation of IUB Chair Geri Huser as a hearing witness should be stricken.

Filed this 5th day of July, 2022.

Respectfully submitted,

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ATTORNEYS FOR  
SUMMIT CARBON SOLUTIONS

**CERTIFICATE OF SERVICE**

The undersigned certifies the foregoing document was electronically filed with the Clerk of Court using the Electronic Document Management System (EDMS) on July 5, 2022, which will send a notice of electronic filing to all registered parties.

/s/ Sarah McCray